

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

JOHN W. McQUEEN,

Plaintiff,
vs.

Civil Action 2:12-cv-1124
Judge Watson
Magistrate Judge King

NANCY BERRYHILL,

Defendant.

REPORT AND RECOMMENDATION

Plaintiff, a state prisoner, brings this action seeking past benefits allegedly due him under the Social Security Act. This matter is now before the Court for the initial screen of the *Complaint* required by 28 U.S.C. §§ 1915(e)(2), 1915A.

Plaintiff alleges in the *Complaint*, Doc. No. 1, that he is entitled to Social Security benefits (whether disability insurance benefits, supplemental security income or old-age benefits is not entirely clear), but that defendant, apparently an employee of the Social Security Administration, has refused to pay those benefits to plaintiff. The *Complaint* further alleges that exhaustion of plaintiff's claim "would be a waste of time." *Id.*, p. 3.

Federal law establishes the proper procedure to be followed when an individual believes that he has been improperly denied Social Security benefits. Section 405(g) of Title 42 of the United States Code provides, in pertinent part, as follows:

Any individual, after any final decision of the Commissioner of Social Security made after a hearing to which he was a party, irrespective of the amount in

controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Commissioner of Social Security may allow.

The Commissioner of Social Security is the only proper defendant in such an action. *See id.* Moreover, an action for review of the denial of Social Security benefits can be brought in a court only after the Commissioner of Social Security has issued a final decision "made after a hearing to which he was a party. . . ." 42 U.S.C. § 405(g). This procedure is the only procedure that can be followed if an individual seeks review by a court of a denial of Social Security benefits. 42 U.S.C. § 405(h).¹

Because plaintiff has not followed the procedures set forth in 42 U.S.C. § 405(g), *i.e.*, he has not named the Commissioner of Social Security as a defendant and it does not appear that the decision challenged by plaintiff was the subject of a hearing before the Social Security Administration, this action cannot proceed.²

It is therefore **RECOMMENDED** that this action be dismissed for lack of subject matter jurisdiction and for failure to state a claim upon which relief can be granted.

If any party seeks review by the District Judge of this *Report and Recommendation*, that party may, within fourteen (14) days, file and serve on all parties objections to the *Report and Recommendation*, specifically designating this *Report and Recommendation*, and the part

¹ Section 405(h) provides, in pertinent part: "No action against the United States, the Commissioner of Social Security, or any officer or employee thereof shall be brought under section 1331 or 1346 of Title 28 to recover on any claim arising under this subchapter."

thereof in question, as well as the basis for objection thereto. 28 U.S.C. §636(b)(1); Fed. R. Civ. P. 72(b). Response to objections must be filed within fourteen (14) days after being served with a copy thereof. Fed. R. Civ. P. 72(b).

The parties are specifically advised that failure to object to the *Report and Recommendation* will result in a waiver of the right to *de novo* review by the District Judge and of the right to appeal the decision of the District Court adopting the *Report and Recommendation*. See *Thomas v. Arn*, 474 U.S. 140 (1985); *Smith v. Detroit Fed'n of Teachers, Local 231 etc.*, 829 F.2d 1370 (6th Cir. 1987); *United States v. Walters*, 638 F.2d 947 (6th Cir. 1981).

s/Norah McCann King
Norah McCann King
United States Magistrate Judge

DATE: December 18, 2012

² The Court expresses no opinion on the timeliness of plaintiff's action.